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FACEBOOK, INC. and  
MARK ZUCKERBERG

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN FRANCISCO DIVISION**

CHILDREN'S HEALTH DEFENSE,  
  
Plaintiff,  
  
v.  
  
FACEBOOK, INC., ET AL.,  
  
Defendants.

Case No. 3:20-cv-05787-SI

**DEFENDANTS FACEBOOK INC.'S  
AND MARK ZUCKERBERG'S  
OPPOSITION TO PLAINTIFF'S  
MOTION TO FURTHER  
SUPPLEMENT ITS SECOND  
AMENDED COMPLAINT AND FOR  
IN CAMERA INSPECTION**

Hon. Susan Illston  
Courtroom 1 – 17th Floor  
Date: July 16, 2021  
Time: 10:00 a.m.

Children’s Health Defense (“CHD”) now seeks its *fifth* modification to the complaint it originally filed nearly a year ago. Including the allegations in CHD’s pending motions to supplement, the operative pleading would span 431 paragraphs over three separate filings. But the allegations in the second proposed supplement—like those in the first proposed supplement and many of those in the Second Amended Complaint (“SAC”) itself—have nothing to do with any claimed injury to CHD. The latest proposed allegations concern, instead, efforts by Defendants Facebook, Inc. and Mark Zuckerberg (“Defendants”) to remove *groups, Pages, and accounts* that promote vaccine hesitancy and to demote *comments* that do the same—initiatives with no relevance to Facebook *posts* of the kind at issue here and distinct from the fact-checking program that forms the core of this case. CHD’s attempts to prolong this litigation—and delay adjudication of the incurable defects in its claims—through successive supplemental pleadings should be put to an end. Its latest supplementation is too little to save its claims, too late. CHD’s motion should be denied, and its case dismissed with prejudice.

#### **FACTUAL STATEMENT**

CHD filed the original Complaint in this action on August 17, 2020. ECF No. 1. As set forth in more detail in Facebook’s Opposition to CHD’s first Motion to Supplement, CHD has since filed two amended complaints and a motion to supplement, serially waiting until after Defendants had addressed the previous iteration of its allegations before seeking to shift the target. *See* ECF No. 82 at 1-2. Now, after Defendants’ motion to dismiss has already been argued and taken under submission by this Court, and after CHD filed two unauthorized submissions to further augment the record, CHD once again seeks to lob in new allegations to its ever-changing complaint.

#### **ARGUMENT**

As fully briefed in the context of CHD’s last motion to supplement, there are five factors relevant to a motion to supplement pleadings: “(1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure of previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment.” *Lyon v. U.S. Immigration & Customs Enforcement*, 308 F.R.D. 203, 214 (N.D. Cal. 2015) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)); *see also Yates v. Auto City* 76, 299 F.R.D. 611, 614 (N.D. Cal. 2013) (the same standard

1 applies to motions to supplement under Rule 15(d) as to motions to amend under Rule 15(a)). While  
 2 there is a general presumption in favor of granting leave to amend, “prejudice or a ‘strong showing’”  
 3 on the other factors outweighs that presumption. *Lyon*, 308 F.R.D. at 214. (quoting *Eminence*  
 4 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)). Because each factor weighs  
 5 against supplementation, CHD’s motion should be denied. Alternatively, even if the Court were to  
 6 grant CHD’s motion to supplement, it should dismiss CHD’s SAC, twice supplemented, with  
 7 prejudice. Any further amendment, just like the instant motion to supplement, would be futile.

8 **I. SUPPLEMENTATION WOULD BE FUTILE BECAUSE CHD’S *FIFTH* ATTEMPT**  
 9 **TO STATE A CLAIM STILL FAILS**

10 CHD’s proposed second-supplemental allegations do nothing to bolster its claims, and its  
 11 motion should be denied as futile. Even if the proposed new allegations had *any* bearing on the  
 12 claims in the SAC (they do not), the proposed supplemental allegations fail to support any claim for  
 13 relief as they neither render it any more plausible that Facebook made any false statements relating  
 14 to CHD nor plausibly allege that any federal actor was involved in any decision with respect to  
 15 CHD, as is required to allege state action, *see Belgau v. Inslee*, 975 F.3d 940, 946 (9th Cir. 2020)  
 16 (state action requires that “the challenged conduct that caused the alleged constitutional deprivation  
 17 [be] ‘fairly attributable’ to the state[]” (citation omitted)).

18 *First*, CHD is wrong that the new allegations that Facebook takes action against COVID-  
 19 and vaccine-related content even if not verifiably false renders it any more plausible that Facebook  
 20 falsely labeled CHD’s posts as containing false information. *See* Mot. 6. The relevant supplemental  
 21 allegations are wholly unrelated to the claims in this case:

- 22 • The May 11, 2021 article relied upon in paragraphs 1 and 2 of CHD’s proposed  
 23 supplemental allegations explains that Facebook “is *now* removing *groups, pages and*  
 24 *accounts* that deliberately discourage people from taking vaccines, regardless of whether  
 25 the information can be verified as false or not,” describing that as “a shift in policy.” BBC  
 26 Trending, *The Volunteers Using ‘Honeypot’ Groups To Fight Anti-Vax Propaganda*  
 27 (May, 11, 2021), <https://tinyurl.com/bbchoneypot> (quoted at ECF No. 103-1 Ex. 1 ¶ 2).

28 That is irrelevant to CHD’s claims for at least two reasons: (1) the policy postdates any

1 alleged action against CHD by approximately *eight months*, *see* SAC ¶¶ 173, 180, 184,  
 2 191, 194 (alleging that Facebook most recently took action against CHD posts in  
 3 September 2020); and (2) the SAC does not allege that CHD has had any group, Page, or  
 4 account removed.<sup>1</sup>

- 5 • The documents published by Project Veritas and relied upon in paragraphs 3, 4, and 5 of  
 6 the proposed supplement pertain only to “[c]omment [d]emotion” as a way to “reduce  
 7 user exposure to vaccine hesitancy (VH) in comments.” ECF No. 103-1 at 18. That  
 8 effort—which uses an algorithm to identify and demote comments with statements  
 9 promoting vaccine hesitancy, *see id.* at 18-31—has no bearing on content that a user posts  
 10 directly to his or her own Facebook Page (as CHD alleges it did here, *see, e.g.*, SAC ¶¶ 1,  
 11 33, 129, 139). It is also distinct from the fact-checking program that forms the basis of  
 12 CHD’s complaint, in which third-party fact-checkers identify whether a post contains  
 13 false or misleading information, *see* ECF No. 69 at 3-4 (explaining Facebook’s fact-  
 14 checking program). CHD does not allege that Facebook has ever demoted or otherwise  
 15 taken action against any comment it has posted.

16 *Second*, the allegation that Facebook revised its position with respect to the COVID lab-leak  
 17 hypothesis, *see* Mot. 6; ECF No. 103-1 Ex. A ¶¶ 22-24, does not support any inference that  
 18 Facebook either falsely identified CHD’s posts as containing false information or made any content-  
 19 moderation decision—and certainly no decision with respect to CHD’s content—at the behest of  
 20 the federal government. CHD does not allege that it ever posted any content regarding the lab-leak  
 21 hypothesis or that Facebook took action against any such content. Nor does CHD allege that  
 22 Facebook had any reason to doubt its stance on the lab-leak hypothesis prior to its official change  
 23 in position. Rather, the only reasonable inference supported by the allegation is that Facebook  
 24 revises its policies as new facts emerge. On May 14, 2021, for example—approximately a week-  
 25 and-a-half before Facebook’s alleged reversal—a letter in *Science* published by a group of academic

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26 <sup>1</sup> Even if CHD’s supplemental allegation regarding the suspension of non-party Robert F. Kennedy,  
 27 Jr. from Instagram was relevant here, *but see* ECF No. 82 at 10-11, that, too, occurred prior to the  
 28 change in policy referenced in CHD’s supplemental allegations. *See* ECF No. 76-1 Ex. 1 ¶ 2  
 (alleging that Mr. Kennedy’s Instagram account was terminated on February 10, 2021).

1 researchers noted that “more investigation is still needed to determine the origin of the [COVID-19]  
 2 pandemic” and that “[t]heories of accidental release from a lab and zoonotic spillover both remain  
 3 viable.” Jesse D. Bloom et al., *Investigate the Origins of COVID-19*, 372 *Science* 694, 694 (May  
 4 14, 2021), <https://tinyurl.com/sciencemagcovidorigins>.<sup>2</sup> And around the time of Facebook’s change  
 5 in policy, the global media reported that the lab-leak hypothesis “ha[d] been gaining traction”  
 6 following the release of a report indicating that “researchers at the Wuhan laboratory were treated  
 7 in hospital in November 2019, just before the virus began infecting humans in the city.” BBC News,  
 8 *Covid Origin: Why the Wuhan Lab-Leak Theory is Being Taken Seriously* (May 27, 2021),  
 9 <https://tinyurl.com/bbccovidorigin>.<sup>3</sup> The mere fact that Facebook revised its position on the lab-leak  
 10 hypothesis in the face of this emerging recognition of its potential validity does not support an  
 11 inference of state action. Nor does the fact that Dr. Fauci changed his position around the same time.  
 12 General alignment in views or even a “shared goal” does not support state action unless the shared  
 13 goal is specifically to “violat[e] a plaintiff’s constitutional rights.” *Franklin v. Fox*, 312 F.3d 423,  
 14 445 (9th Cir. 2002). That test is plainly not met here, given that CHD does not allege that it ever  
 15 posted any content related to the lab-leak hypothesis.

16 *Third*, the email communications between Mr. Zuckerberg and Dr. Fauci relied upon in  
 17 paragraphs 6 through 21 of CHD’s amended allegations do not lend credibility to CHD’s claims.  
 18 As CHD recognizes in its motion, the allegations in this case focus on the alleged “suppression of  
 19 COVID- and vaccine-related speech” *by CHD*. Mot. 7. The referenced communications, by contrast,  
 20 concern only promoting authoritative information about COVID-19, not suppressing or even fact-  
 21 checking any other information, let alone any posts by CHD. The communications discuss “a few  
 22

23  
 24 <sup>2</sup> The Court may take judicial notice of the fact that, on May 14, 2021, a group of academics  
 25 published an article noting the viability of the lab-leak hypothesis. *See Threshold Enters. Ltd. v.*  
 26 *Pressed Juicery, Inc.*, 445 F. Supp. 3d 139, 146 (N.D. Cal. 2020). The existence and content of the  
 letter cannot reasonably be disputed as they can be readily determined from reliable sources—  
 namely, the *Science* publication and website.

27 <sup>3</sup> The Court may take judicial notice of the fact that a May 27, 2021 BBC article stated that the lab-  
 28 leak hypothesis was gaining traction because of recently released information. *See Threshold*  
*Enters. Ltd.*, 445 F. Supp. 3d at 146. The existence and content of the article cannot reasonably be  
 disputed as they can be readily determined from a reliable source—namely, the BBC website.

1 ideas of ways [Facebook] could help get [Dr. Fauci’s] message out,” including by “building a  
 2 Coronavirus Information Hub” to make available “authoritative information” and “encourage  
 3 people to practice social distance” and by creating “a series of livestreamed Q&As with health  
 4 experts.” ECF No. 103-1 at 37-38. And public statements from Facebook’s Policy Communications  
 5 Director explain that the redacted portions of the emails similarly have nothing to do with  
 6 misinformation or factchecking. Rather, consistent with the subject of amplifying authoritative  
 7 information, Mr. “Zuckerberg told Dr. Fauci of [Facebook’s] plan ... to share Facebook ad credits  
 8 with government agencies to help them run coronavirus PSAs.” Twitter, *Andy Stone on Twitter*  
 9 (June 9, 2021), [tinyurl.com/andystonetwitter](https://tinyurl.com/andystonetwitter).

10 Those communications are irrelevant here. CHD does not and could not allege any injury in  
 11 connection with the Coronavirus Information Hub, any livestreamed Q&As, or any public service  
 12 announcements. Nor do the communications support any inference of state action. Absent specific  
 13 “language suggesting or requiring” the allegedly unconstitutional conduct—which here consists of  
 14 the fact-checking, demotion, and removal of various CHD posts as well as the deactivation of  
 15 fundraising tools, none of which is so much as referenced in the email communications—general  
 16 “offer[s] to assist” between state and private actors do not give rise to state action. *Lansing v. City*  
 17 *of Memphis*, 202 F.3d 821, 833 (6th Cir. 2000); *see also Morse v. North Coast Opportunities, Inc.*,  
 18 118 F.3d 1338, 1343 (9th Cir. 1997) (state action requires sufficient government involvement that  
 19 it be “fair to attribute *the challenged activity* to ... the federal ... government” (emphasis added)).  
 20 Facebook’s offer to help the government combat the coronavirus in ways wholly unrelated to CHD’s  
 21 claims therefore fall far short of alleging state action with respect to any actions taken against CHD.

22 More fundamentally, CHD’s proposed supplemental allegations point to nothing but  
 23 Facebook and Mr. Zuckerberg’s exercise of their own constitutionally protected rights. As private  
 24 actors, defendants have the First Amendment right to exercise their own discretion regarding the  
 25 content distributed or promoted through their platforms. *See, e.g., Jian Zhang v. Baidu.com Inc.*, 10  
 26 F. Supp. 3d 433, 443 (S.D.N.Y. 2014) (First Amendment protects the decision to block content from  
 27 search results). They may decide what messages to exclude from their platforms, *see Miami Herald*  
 28

1 *Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974), as well as what messages to amplify, even if those  
2 messages originate from the federal government.

3 Ultimately, as with CHD's prior attempts to state a claim, the supplemental allegations fail  
4 to establish any state action with respect to the activity challenged in CHD's amended counterclaim,  
5 and the motion to supplement should be denied as futile. Alternatively, and for the same reasons, if  
6 the Court grants CHD's motion to supplement, it should dismiss the SAC as supplemented with  
7 prejudice. CHD has now had *five attempts* to state a claim for relief based on the fact-checking of  
8 its posts and Facebook's related content-moderation decisions. No further amendments will be any  
9 more fruitful.

10 **II. CHD HAS ACTED WITH UNDUE DELAY AND BAD FAITH AND**  
11 **SUPPLEMENTATION WOULD UNDULY PREJUDICE DEFENDANTS**

12 CHD's motion should also be denied for the independent reason that CHD's  
13 supplementation is the result of undue delay and not brought in good faith.

14 As this Court is well aware, CHD has repeatedly sought to alter its pleadings while a motion  
15 to dismiss was pending before the Court. First, CHD sought to file a First Amended Complaint  
16 rather than respond to Defendants' original motion to dismiss, filed on October 23, 2020. ECF No.  
17 56. Then, on December 4, 2020—two weeks before Defendants' motions to dismiss CHD's First  
18 Amended Complaint were due, CHD sought leave to file a SAC. ECF No. 65. Three days after  
19 completion of briefing on Defendants' motion to dismiss the SAC, CHD filed its first motion to  
20 "supplement"; almost all of the proposed supplemental allegations were known to CHD well before  
21 briefing on the motion to dismiss was complete, but CHD waited until after Defendants had briefed  
22 the motion to come forward with them. ECF No. 82. Most recently, after the Court had already  
23 heard extended oral argument on Defendants' motions to dismiss and taken them under submission,  
24 CHD lobbed in yet more unauthorized submissions, including a "Request for Judicial Notice" that  
25 was nothing more than a thinly-veiled supplemental brief attempting to submit new argument and  
26 authority to the Court. ECF No. 97.

27 Distressingly, CHD's latest submission is more of the same. The latest supplement does not  
28 even attempt to add factual allegations that would address the fundamental failings in CHD's legal



1 theories that have been exposed by Defendants’ motions to dismiss. As described above, *see supra*  
 2 pp. 2-3, many of CHD’s proposed supplemental allegations of purported collaboration between  
 3 Facebook and the federal government post-date the alleged conduct set forth in CHD’s SAC. Of  
 4 course, allegations of federal-private interactions that “post-date the relevant conduct that allegedly  
 5 injured Plaintiff[]” “do not establish joint action,” *Federal Agency of News LLC v. Facebook, Inc.*,  
 6 432 F. Supp. 3d 1107, 1125-1126 (N.D. Cal. 2020). CHD’s other proposed supplemental allegations  
 7 concern specific moderation activity distinct from the third-party independent fact-checking  
 8 program at issue here.<sup>4</sup>

9 Eleven months (and 100+ docket entries) into this case, Defendants have expended  
 10 substantial resources in addressing CHD’s successive pleadings and multiple unauthorized  
 11 submissions. And significantly, the Court has already invested substantial time in considering the  
 12 viability (or lack of viability) of CHD’s claims in conjunction with the latest motion to dismiss.  
 13 Whatever extrajudicial reasons CHD may have for seeking to delay adjudication of the pending  
 14 motions to dismiss, it has by now pled its best case—a few times over. CHD must stop attempting  
 15 to move the target and allow the Court to rule.

### 16 **III. CHD’S REQUEST FOR *IN CAMERA* INSPECTION SHOULD BE DENIED**

17 CHD’s request for *in camera* inspection of a March 2020 email must be denied as well.  
 18 Curiously, CHD styles its motion as a motion pursuant to the All Writs Act, 28 U.S.C. § 1651, but  
 19 that law applies only in “the most critical and exigent circumstances,” *Brown v. Gilmore*, 533 U.S.

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21  
 22 <sup>4</sup> Indeed, even after Defendants have highlighted the troubling pattern of CHD’s filings in this case,  
 23 CHD persists. *See* ECF No. 82 at 5 (“CHD’s latest amendment continues the same strategy: let  
 24 Defendants expend time and money addressing the insufficiency of CHD’s pleading, and then, at  
 25 the eleventh hour, change the pleading to avoid or delay adjudication of that question. It is time for  
 26 the Court to put this maneuvering to a stop. Rule 12 motions are not a game of whack-a-mole. At  
 27 some point, the plaintiff must state claims that are stable enough for the Court to evaluate them.  
 28 Here, after multiple amendments and over 150 pages, CHD has surely pled its best case. The Court  
 must now rule on whether that pleading states a viable claim. ECF No. 99 n.1 (“[T]he pattern and  
 timing of CHD’s serial supplements and motions is troubling to say the least. CHD’s latest  
 submissions only exacerbate the concern that CHD is unjustifiably prolonging and multiplying these  
 proceedings, thereby imposing unreasonable burden and expense not only on Defendants but also  
 on the Court.”).



1 1301 (2001) (Rehnquist, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v.*  
 2 *NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J. in chambers)). Relief under the All Writs Act is  
 3 available “only if the legal rights at issue are indisputably clear.” *Id.* (internal quotation marks  
 4 omitted).

5 CHD fails to explain why such extraordinary relief would be warranted here, and for good  
 6 reason: it is not. The communication between Mr. Zuckerberg and Dr. Fauci described in the motion  
 7 to supplement does not support CHD’s fact-checking claims. To the contrary, it concerns distinct  
 8 efforts to promote authoritative information about a developing global pandemic. As noted above,  
 9 public statements from Facebook’s Policy Communications Director explain that the redacted  
 10 portions of the emails are not related to misinformation or factchecking. Consistent with the subject  
 11 of amplifying authoritative information, Mr. “Zuckerberg told Dr. Fauci of [Facebook’s] plan ... to  
 12 share Facebook ad credits with government agencies to help them run coronavirus PSAs.” Twitter,  
 13 *Andy Stone on Twitter* (June 9, 2021), [tinyurl.com/andystonetwitter](https://twitter.com/andystonetwitter).

14 Of course, if the Court wishes to review the document at issue *in camera* and confirm for  
 15 itself that the unredacted document is irrelevant to CHD’s claims, Defendants stand ready to submit  
 16 the document for the Court’s review.

### 17 **CONCLUSION**

18 CHD’s Motion to Further Supplement and for *In Camera* Inspection should be denied, or, if  
 19 granted, its Second Amended Complaint should be dismissed with prejudice because the  
 20 supplemental allegations still fail to cure its fatal defects.

21  
 22  
 23 Dated: June 21, 2021

WILMER CUTLER PICKERING, HALE AND  
 DORR LLP

24 By: /s/ Sonal N. Mehta  
 25 SONAL N. MEHTA

26 *Attorney for Defendants*  
 27 Facebook, Inc. and Mark Zuckerberg  
 28

**CERTIFICATE OF SERVICE**

I hereby certify that on June 21, 2021, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

Dated: June 21, 2021

By: /s/ Sonal N. Mehta  
Sonal N. Mehta